No. 76-176

In the Supreme Court of the United States

OCTOBER TERM, 1976

VIRGIL ALESSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that a plea bargain he made with prosecutors in the United States Attorney's Office for the Eastern District of New York bars his prosecution under an indictment now pending against him in the Southern District of New York.

On August 4, 1975, petitioner was charged in five counts of an indictment in the Southern District of New York with aiding and abetting the receipt, concealment, transportation, distribution, and possession of heroin with intent to distribute, in violation of 21 U.S.C. 812, 841 (a)(1), 841(b)(1)(A), and 18 U.S.C. 2. Trial was scheduled to commence on January 20, 1976.

Prior to trial petitioner moved to dismiss the charges against him, claiming that the indictment violated the terms of a 1972 plea agreement he had reached with the

Office of the United States Attorney for the Eastern District of New York, pursuant to which petitioner pleaded guilty to conspiracy to violate the federal narcotics laws (21 U.S.C. 846) in return for a recommendation that a suspended sentence be imposed and a promise that he would not be prosecuted for overt acts committed during the course of the conspiracy that might constitute substantive violations of the federal narcotics laws. The district court ruled that it would reserve decision on the motion until the conclusion of the trial.

Petitioner thereupon filed a notice of appeal, which the government moved to dismiss. On January 19, 1976, the court of appeals, treating petitioner's appeal as a petition for mandamus, ordered the trial court to hold a pretrial hearing on petitioner's motion and either to grant petitioner a severance or to postpone the trial until such a hearing could be held. On the same date the trial court severed petitioner's case from that of the remaining defendants, whose trial began as scheduled on January 20.[1]

On April 6, 1976, after a hearing,[2] the district court denied petitioner's motion to dismiss the indictment, holding that the offenses charged in the Eastern District indictment to which petitioner had pleaded guilty in 1972 were different from the offenses charged in the present

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[1]Trial against defendants Iarossi, Panebianco, Leonard Rizzo, Croce, Blanchard, Brooks, and Anatala was concluded on February 4, 1976. The jury returned a verdict of guilty as to all defendants on all counts. Defendants Huff and Fiore Rizzo were also severed. Defendants Graziano Rizzo, D'Amato, and Barone pleaded guilty prior to trial. Defendant Passero was a fugitive at the time of trial.

[2]The parties agreed that the issue should be determined on the basis of the record developed in *United States* v. *Papa*, 533 F. 2d 815 (C.A. 2), pending on petition for a writ of certiorari (No. 76-5073).

Southern District indictment, and that the representations made by the United States Attorney's Office for the Eastern District of New York did not bind the prosecutor in the Southern District. Petitioner appealed again. The court of appeals entertained the interlocutory appeal and affirmed the district court's order on the merits (Pet. App. 28a-33a).

1. The question whether the courts of appeals have jurisdiction over interlocutory appeals in cases such as this one is before this Court in *Abney* v. *United States*, No. 75-6521, certiorari granted, June 14, 1976, and presumably will be resolved this Term. For the reasons stated in our response to the petition for a writ of certiorari in *Abney*, and in our memoranda in *Barket* v. *United States*, No. 75-1280,[3] we believe that the court of appeals improperly assumed jurisdiction over petitioner's interlocutory appeal. For the reasons given in our supplemental memorandum in *Barket*, however, there is no need to hold this case pending decision in *Abney*: If the Court decides the jurisdictional question in *Abney* in the government's favor, it would be without jurisdiction to consider the question presented by petitioner at this interlocutory stage of the case. If, on the other hand, it upholds the jurisdiction of the court of appeals in *Abney*, it would still have no occasion to grant review here unless the double jeopardy issue raised by petitioner independently merits review.

2. We submit that the question presented by petitioner does not merit review and that certiorari should be promptly denied so that petitioner's long-delayed trial may go forward.

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[3]We are sending petitioner's counsel copies of our filings in *Abney* and *Barket*.

Petitioner's contention is that the agreement with prosecutors from the Eastern District that he would not be prosecuted for overt acts committed in furtherance of the Eastern District conspiracy extended to prosecutions, and was binding on prosecutors, in the Southern District. Despite petitioner's attempt to characterize his argument (Pet. App. 9) as raising a purely legal issue, the threshold question of the scope of the agreement presents a simple issue of fact unsuitable for review by this Court: did the parties agree that the plea bargain would bar prosecutions outside of the Eastern District? The court of appeals correctly resolved this factual question adversely to petitioner, holding that the following language, cited with approval from *United States* v. *Papa, supra,* 533 F. 2d at 824-825, was dispositive as to the scope of the 1972 Eastern District plea bargain (Pet. App. 30a):

> The representations made by [Strike Force Attorney] Druker related expressly and by necessary implication exclusively to Eastern District investigations and prosecutions. The terms of the bargain did not extend to matters under investigation elsewhere. Papa's attorneys' principal concern was to ensure that their client would not be re-indicted on "pieces" of the Eastern District conspiracy. Druker promised that the bargain immunized Papa from any further prosecution on the basis of any future information he received related to the Eastern District conspiracy. Papa's attorneys secured a promise from Druker that there would be no additional prosecution stemming from matters presently under investigation in the Eastern District. Druker specifically refused to grant appellant *"carte blanche"* immunity as to all his past criminal conduct, and carefully noted that Papa was still subject to prosecution on any unrelated criminal activity. Never once was Druker asked to inquire about investigations in the Southern District nor was he asked to include Southern District crimes in the plea negotiations. Indeed, when Druker was queried by Papa's attorneys as to the money seized from Papa in February, 1972, he responded: "It's in the Southern District's bailiwick and I don't know what if anything they are going to do with it."

The court of appeals ruled (Pet. App. 33a) that there was no evidence "to show that the Eastern District was attempting to evade its own obligations by transferring a prosecution across the East River," and it concluded "that insofar as the plea bargain can be understood to confer an immunity from narcotics law prosecutions greater than that given by the double jeopardy clause, it was not in the contemplation of either side that anyone outside of the Eastern District U.S. Attorney's or Strike Force Offices was bound" (*ibid.*). This conclusion was correct and further review of this factual matter is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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